

JOSEPH W. CROWLEY

IBLA 85-417

Decided May 23, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application W-90695.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: Applications: Filing

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers has not "formulated" the application within the meaning of 43 CFR 3112.2-4 or 43 CFR 3112.0-5.

APPEARANCES: Joseph W. Crowley, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Joseph W. Crowley has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 4, 1985, rejecting his noncompetitive application for oil and gas lease (W-90695). Crowley's application had been selected with first priority for parcel WY-571 in the August 1984 simultaneous oil and gas drawing.

BLM rejected Crowley's application because he failed to indicate on his lease application that Smith Webber Exploration, Inc. (Smith Webber) had provided assistance with his application. Crowley had signed and dated Part B (Form 3112-6a) of his application, but made no entry in the space entitled "FILING ASSISTANCE (FULL NAME, ADDRESS AND ZIP CODE, IF APPLICABLE)," and had made no reference whatsoever to any entity or person providing assistance to him on his application.

BLM originally identified Smith Webber as having entered into "contractual relationships" with several July 1983 simultaneous oil and gas lease applicants by its preprinted, white envelope. A memorandum to the file dated

January 2, 1985, by a BLM employee notes, in reviewing applications for the August 1984 filing, BLM again noticed that applicants, had used Smith Webber's services, and "felt that in all fairness to the applicants, BLM should investigate more thoroughly the actual contractual relationship existing between the applicants and the filing service, if any." Pursuant to this investigation, by letter dated October 23, 1984, BLM requested information from appellant as to the existence of "any Service Agreement or contract which may be in effect between you and [Smith Webber], or a statement of the type of service this firm has provided you." Appellant responded to BLM's request by providing copies of "Advisory Agreement[s]" between himself and Smith Webber, as well as a two-page description of the history of their "contractual relationship." Of note is appellant's summary of his discussion with an employee of Smith Webber concerning whether and how to complete the box entitled "FILING ASSISTANCE (FULL NAME, ADDRESS AND ZIP CODE IF APPLICABLE)":

I do recall however one point that we spoke about . . . the section labeled "Filing Service Full Name . . ." I was concerned, and he offered no help with \* \* \* filling this area in.

When I called (around Sept. 16) and asked him what to put in this area, he explained that legally and technically it should be left blank. He said that Smith Webber was not a filing service nor did they hold any interest in my filing. As I understood it he was saying that, I did all the paperwork, (which I did), so in fact I was doing the filing and not Smith Webber . . . sounded logical to me . . . furthermore he would not share in any profits from the awarding of any lease that I may win, so he held no interest . . . also sounded logical. But just in case I thought I should play it safe, I once again called the Bureau of Land Management and asked for assistance.

In the Advisory Agreement dated September 3, 1983, Crowley agreed to pay Smith Webber \$ 816.00 for a total of 3 "parcel recommendations," and in the Advisory Agreement dated October 19, 1983, Crowley agreed to pay Smith Webber \$ 1,632.00 for a total of 6 "parcel recommendations." The language of Paragraph 5 of the Agreement is to the following effect:

Selection: The suggested selection of the parcels is to be made by Smith Webber Exploration, Inc. from a list provided by the Bureau of Land Management, or the Commissioner of Public Lands, State of Wyoming. Smith Webber Exploration, Inc., shall under no circumstances participate in any profits or over-riding royalties acquired by the Client. Each filing period, Smith Webber Exploration, Inc. will forward to the Client parcel recommendations, plus the filing fees to be paid to the appropriate agency. [1]

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1/ Notwithstanding the provision of the agreement that "filing fees" will be forwarded to the client, the record contains a photocopy of appellant's check in payment of both the filing fee and the advance rental for the parcels which he applied for in the drawing.

In summary, Smith Webber provided to its clients, including Crowley, number recommendations and a preprinted envelope only, with no additional information which would be helpful in making a parcel selection. Appellant completed Part B (Form 3112-6a), and submitted a check drawn on his own personal account to cover the \$ 350 fee for filing fees and advance rental.

As stated in its January 4, 1985, decision, BLM found "filing service assistance where parcel recommendations" were made in such manner as to reduce the "degree of choice in parcel selection exercised by the client." Assistance in the nature of "evaluations of parcels," based upon which information the client "exercises complete choice" regarding which and how many parcels are selected, was not construed by BLM as "filing service assistance." By contrast, where the entity provides a "finite list of recommended parcel numbers," BLM inferred that the client exercised no choice in making the selections, and concluded the client received "filing service assistance." BLM decided on January 4, 1985, that Crowley fell into the latter category and rejected his application:

Based on additional information you submitted in response to our request, we have determined that [Smith Webber] did, in fact, provide you assistance in filing your application by providing you specific parcel recommendations. Your application, copy enclosed, failed to reflect that firm's name and address in the "FILING SERVICE'S FULL NAME, ADDRESS AND ZIP CODE (IF APPLICABLE)" block.

[1] The issue before the Board is whether Smith Webber's provision of "parcel recommendations" amounts to filing service assistance. The regulation at 43 CFR 3112.2-4 provides:

Any applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program shall indicate on the lease application the name of the party or filing service that provided assistance.

The definition of "person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program," as provided at 43 CFR 3112.0-5, 2/ includes the following:

[T]hose enterprises, commonly known as filing services, which sign, formulate, prepare or otherwise complete or file applications for oil and gas leases for consideration. All other services such as general secretarial assistance or general geologic advice whether or not it is specifically related to Federal lease parcels or leasing, are excluded from this definition.

48 FR 33678 (July 22, 1983).

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2/ This regulation was published July 22, 1983, and became effective Aug. 22, 1983.

Deleted from this regulation was language included in its predecessor, 43 CFR 3100.0-5(d) (1982), to the effect that enterprises which "offer advice on formulation or preparation, mail, deliver, receive mail or otherwise complete or file lease applications," must be disclosed to BLM. <sup>3/</sup> However, despite this express deletion, the preamble to the 1983 regulation contains language which purports to bring back within the ambit of that regulation those very enterprises explicitly left out:

The definition of the term "person or entity providing assistance to the participants in the Federal simultaneous oil and gas program" contained in § 3112.0-5 of the final rulemaking is intended to cover not only those entities that perform services commonly known as "filing services" but also those that furnish advice or counseling that is directly related to the filing of simultaneous oil and gas lease applications. Agreements with these types of entities must be identified in the application. [Emphasis supplied.]

48 FR 33656 (July 22, 1983).

Moreover, on August 19, 1983, the Department published a Federal Register notice at 48 FR 37656, stating its intent to "strictly enforce the provisions of amended \* \* \* § 3112.2-4 which pertain to filing assistance." The stated purpose for the strict enforcement was to "preserve the integrity of the simultaneous oil and gas lease program by ensuring against multiple filings on a single parcel as prohibited by amended § 3112.5-1." The Department stated in the Federal Register notice that 43 CFR 3112.2-4 "requires identification of any party rendering any type of assistance in the filing of an application submitted under Part 3112." 48 FR 37656 (Aug. 19, 1983) (Emphasis added).

This Board considered the effect to be given 43 CFR 3112.2-4 in Ronald Valmonte, 87 IBLA 197 (1985), in which the facts and the issue presented are

<sup>3/</sup> Prior to the Aug. 22, 1983, effective date of 43 CFR 3112.0-5, the phrase "person or entity in the business of providing assistance to participants in a Federal oil and gas leasing program" was defined at 43 CFR 3100.0-5(d) (1982) to include:

"[T]hose offering services for consideration in connection with the acquisition of Federal oil and gas leases. Included in this definition are those enterprises, commonly known as filing services, which sign, formulate prepare, offer advice on formulation or preparation, mail, deliver, receive mail or otherwise complete or file lease applications or offers for consideration. Excluded from the definition are those services which only tangentially relate to Federal oil and gas lease acquisition, such as general secretarial assistance, or general geologic advice which is not specifically related to Federal lease parcels or leasing."

BLM would have been accurate in rejecting Crowley's lease application had this definition been in effect in Aug. 1984. Smith Webber would have clearly qualified as a filing service engaged in offering advice on the preparation of lease applications for a consideration. See Bernard S. Storper, 60 IBLA 67 (1981).

similar to those of the present appeal. As to the obvious conflict between 43 CFR 3112.0-5 and 43 CFR 3112.2-4 on the one hand, and the preamble and notice on the other, the Board ruled that the regulation itself is "clear and unambiguous," and that "BLM is obligated to enforce the regulation as it is written." 87 IBLA at 201. The preamble "can best be described as contradicting the express regulatory language," and the notice does not reflect "the clear language of the regulation limiting the definition of filing service assistance to those entities which sign, formulate, prepare or otherwise complete or file applications and no other." 87 IBLA at 201. Although preambles and notices may be useful in the interpretation of an ambiguous regulation, where the regulation is positively clear, as is 43 CFR 3112.0-5 and 43 CFR 3112.2-4, preambles and notices may not be used to "supplant the regulation." Id.

The question presented in Crowley's appeal is simply whether Smith Webber is "in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program." Smith Webber is in that business if it "sign(s), formulate(s), prepare(s) or otherwise complete(s) or file(s) applications for oil and gas leases for consideration" as provided by 43 CFR 3112.0-5. We find that Smith Webber's conduct in providing parcel recommendations and an envelope addressed to BLM in which to send the oil and gas application, the completion of which was Crowley's responsibility, does not bring it within the scope of the regulations. <sup>4/</sup> Accordingly, BLM improperly rejected Crowley's application, since Crowley was under no obligation to disclose its association with Smith Webber.

We are bound by this Board's ruling in Ronald Valmonte, supra, wherein we held that Wesco Oil Properties (Wesco) had not rendered "assistance" to Valmonte by making parcel recommendations. The Board rejected BLM's contention that by making such recommendations, Wesco had formulated Valmonte's application because Valmonte exercised no choice in making the parcel selection, whereas if provided with geological information along with the parcel recommendations, the applicant would have been required to exercise some choice in the selection. The Board cogently reasoned that providing geological information neither means that the applicant has the knowledge necessary to analyze such information, nor that the applicant's degree of choice is necessarily increased.

We find that Smith Webber did not formulate Crowley's application, and did not otherwise provide the assistance which requires disclosure on part B. As in Ronald Valmonte, supra, Smith Webber did not complete any portion of

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<sup>4/</sup> We find this case is properly distinguished from John G. O'Leary, 86 IBLA 131 (1985), where the filing service actually filled in the application, prepared a remittance with the proper amount to cover filing fees, and transmitted the application to the applicant with the instructions that "your only responsibility is to sign your name on Part B as it appears on Part A." Although the copies of the advisory agreement in the record recite that Smith Webber will forward to the client filing fees to be paid, it is clear from the record that payment for both the filing fee and the advance rental was made by appellant's personal check.

Part B; rather, the complete tasks of preparing that form, submitting the application fee, and mailing the application package were left to Crowley's performance. His application for parcels recommended by Smith Webber does not obscure the fact that this was his "free choice." As we found in Valmonte, supra, "Appellant may well have formulated his application based upon the advice supplied by [Smith Webber], but that formulation was, nevertheless, his own." 87 IBLA at 202.

Because Smith Webber did not "sign, formulate, prepare or otherwise complete or file" Crowley's noncompetitive application to lease oil and gas, Crowley was not required to list Smith Webber on that application.

Accordingly, BLM's decision rejecting Crowley's application was improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file is remanded for further action consistent herewith.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

John H. Kelly  
Administrative Judge

